

# Eugene Rostow

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When Eugene Rostow left Yale to work in the Department of State as Undersecretary for Political Affairs in 1966, I had no right to be surprised. It was in Washington that I had first heard of him as a rising star and in Washington that I had first met him as a recruiting dean. His Yale colleagues had long known of his work on the relocation of Japanese-Americans, on regulation of the economics of oil, and other problems connecting law and policy at the national or international level. As we knew him well enough by 1966 to be aware, the depth of his patriotism was indicated by the very fact that he considered public service to be worthy of his best attention. Yet I must confess to a certain disappointment: Rostow had just been made Master of Trumbull, one of Yale's residential colleges, of which I happened to be a fellow, and his departure made me wonder whether the nation's gain would really offset Trumbull's loss.

In the end both college and republic survived, a little the worse for wear. Rostow worked at State till the end of the Johnson administration, returned to Yale, taught at Oxbridge, kept up his activity on behalf of the Atlantic alliance and the Committee on the Present Danger, and rejoined Washington officialdom in the Reagan Administration as head of the Arms Control and Disarmament Agency. Throughout his career, he has woven ideas or beliefs about American constitutional bases and practices with others about international diplomacy, politics, and force. The linking threads are morality and law.

While Rostow's subject matter ranges the globe and his focus varies from reaction to the day's cables to interpretation of the Peace of Westphalia, his main themes can be grouped under three headings. The first is the inescapable imperative of order, disciplined by law. The second is the rightness of binding people and nations against their present will through appeal to the *concordia* of the social compact. The third is the necessity of maintaining stability and channeling change through flexible constraints of a balance of power. To him the three themes are apparently not only consistent but overlapping and even interdependent.

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## I.

As a shovel-carrying Legal Realist, Rostow insists that "law can be studied only in its integument of reality" and that "we must take into account what is generally called history, politics, public opinion, morality, and custom quite as much as the abstract sentences which purport to state legal 'rules' in the law books."<sup>1</sup>

Soaked in the spirit of Montesquieu and his laws, Rostow vigilantly calls for the exercise of power by mutually protective coordinate branches of government, especially the judiciary and the executive. Direct democracy, especially in what he wrote around the time of campus troubles in the late sixties and early seventies, gets none of the admiration he reserves for statesmanlike social contrivance such as representative government in the republic of the United States and the concert of States (at least when they play the right tunes) in the United Nations.<sup>2</sup> He defends Presidential power in the United States, especially in the conduct of foreign affairs;<sup>3</sup> he exhorts federal judges to take on the burden of constitutional interpretation instead of taking shelter behind the screen that declares legislation the monopoly of the legislature; he urges lawyers and public officials to help the courts in the task of public education so fateful decisions like the desegregation cases come to command enlightened assent, not mere sullen acquiescence, from the people.<sup>4</sup>

If all works as it ought to do, the nation is secure within because its citizens recognize their moral obligation to obey the law;<sup>5</sup> in turn they are protected by the nation's laws. The nation protects itself also against internal subversion: "Every government and every society has an inherent right to insist on obedience to its laws, to restore order, and to assure its own survival."<sup>6</sup> Meanwhile, out in the world, the nation is secure to the extent that politics secretes law<sup>7</sup> so as to safeguard minimum order and promote an order better than minimal. Thus Rostow praises a reviewed author for taking as a goal formulating "the law as a method for helping to govern the process of world politics."<sup>8</sup>

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1. E. ROSTOW, *LAW, POWER, AND THE PURSUIT OF PEACE* x (1968) [hereinafter cited as *LAW, POWER, AND THE PURSUIT OF PEACE*].

2. Cf. Rostow, Book Review, 82 *YALE L.J.* 829, 846 (1973) (reviewing J. MOORE, *LAW AND THE INDO-CHINA WAR* (1972)) (drawing analogy between U.S. Constitution and U.N. Charter as attempts to state fundamental principles for organizing respective communities); Rostow, *The Supreme Court and the People's Will*, 33 *NOTRE DAME LAW.* 573 (1958) (representative democracy established in U.S. Constitution, but not through "an omniscient popular government").

3. E. ROSTOW, *THE IDEAL IN LAW* 141-42 (1978) [hereinafter cited as *THE IDEAL IN LAW*].

4. Rostow, *The Supreme Court and the People's Will*, *supra* note 2, at 596.

5. *LAW, POWER, AND THE PURSUIT OF PEACE*, *supra* note 1, at xvi.

6. *THE IDEAL IN LAW*, *supra* note 3, at 139.

7. Rostow, Book Review, *supra* note 2, at 831.

8. *Id.* at 854.

Alas, all does not always work as it ought to, and public order is ever and anon under threat of falling apart. (Take but degree away, untune that string . . . .) Rostow was saddened and repelled by riot in the colleges in the late sixties and early seventies, with its implications for larger disorder; he noted what he considered to be the fragility of universities' governance, resting on presuppositions of civilized assent.<sup>9</sup> He observed over and over that in international politics the wages of crime are not punishment or even reprobation but, often, only accretion of influence.<sup>10</sup>

These melancholy observations tend to lead Rostow to insist on the unflinching use of power—justly if possible, but at all events effectively—to maintain or restore order. Perhaps he makes his case a little too easy by assuming that the power-wielders have law on their side (that is, to turn the point *ad hominem*, by assuming that they act on advice of a Rostow); but those who disrespect the power-wielders' claims usually have claims of their own, which often sound in Law and always resound in Justice. Rostow reminds us that "there is a profound difference between power in the service of law, and power as its enemy."<sup>11</sup> Who edits the scorecard that identifies the sides? Rostow surely would not concede that he is saying only that Our force is good but Their violence is bad, or that Their force is prohibited by Article 2(4) of the U.N. Charter but Our violence is privileged under Article 51. Yet in the absence of some competent recognized impartial authority to handle even those cases that we should agree were justiciable, those shadowy arbiters known as the court of public opinion and the judgment of history will not always come when we do call them, and when they come they will not always call them as we see them.

## II.

To anchor law in public morality, in the sense of making obedience to the law a moral duty, Rostow has recourse to the social contract. As his style is by turns descriptive, hortatory, playful, and oblique, one is left in some doubt whether he takes the social contract as event, sacred legend, myth, or metaphor, but there is no question that whatever it is, he takes it seriously. He uses it as the source of the obligation to obey the law. At the level of the nation (he usually prefers *nation* to *state*), the terms of the contract are that in return for participating in the making of the law the citizen is bound morally to obey even that law that the citizen deems unjust:

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9. THE IDEAL IN LAW, *supra* note 3, at 130–31.

10. See Rostow, Book Review, *supra* note 2, at 832–33.

11. THE IDEAL IN LAW, *supra* note 3, at 270.

[I]f man lives in a society of consent, and above all in a society of equality and of liberty, his relation to the valid laws of that society should be regarded as moral in character, and entitled to great weight in the hierarchy of moral claims he must face in the course of his life.<sup>12</sup>

For the citizenry of the United States, Rostow locates the source of the obligation in the constituent part of our constitutional history followed by the continual interplay of judges, lawyers, legislators, executives and the public.<sup>13</sup>

When it comes to law among the nations, the constituent particularity of the social contract becomes more mythical. Accepting the personification of nations, a move that has become so common as to lose its problematic character, Rostow then attributes to the nations, on the basis of their actions or acquiescence over (recent) centuries, consent to the global arrangements currently worked out for the prohibition of certain kinds of force and the enforcement of that prohibition. What is the most significant moment of the international social compact? Rostow probably would put it, by no accident, at around the time of the Marshall Court, that is, at the Congress of Vienna in 1815. He pays sardonic but touching tribute to Metternich and Castlereagh as leaders who helped put Europe together after Napoleonic devastation of the old system and managed to leave a structure that averted general European war for a hundred years.<sup>14</sup>

### III.

For Rostow, the special virtue of Castlereagh, Metternich, and some of their successors was not that they had an ideal vision of a progressive and just society. It was that they promoted a way to contain and correct perturbations in the state system: the control mechanism that came to be known as the balance of power. In this mechanism, the upstart disturber of the peace is checked by accumulated and allied counter-force; principle blends with *Realpolitik*. Lacking a unitary government, the international order depends on coalition diplomacy for the rule of peace.<sup>15</sup>

"Balance" here seems to mean both a working equality of forces and a stable set of positions which that equality is to assure. What determines the spatial and social location of those positions? Apparently, the desired situation is that of the time the guns last stopped, always provided that an

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12. *Id.* at 92.

13. *Id.* at 87.

14. See LAW, POWER, AND THE PURSUIT OF PEACE, *supra* note 1, at 19. He does say, *obiter*, that in 1848 he would have been among the rebels, in temperament and outlook. *Id.* at 22.

15. See E. Rostow, Morality and Pragmatism in Foreign Policy 4 (Nov. 12, 1984) (unpublished manuscript).

aggressor is not left with ill-gotten gains.<sup>16</sup> Thus, for the period since the end of the Second World War, Rostow believes that no side had the right to alter by force the situation that obtained at the end of hostilities, and that collective security through the U.N. Security Council or—that failing—through a network of alliances and coalitions should maintain the status of 1945 as near as might be.<sup>17</sup>

Rostow would not be troubled by the question of whether maintenance of this balance belongs to international law, international relations, or international power politics, because he does not believe in an impermeable barrier between strategic principles and moral principles.<sup>18</sup> Neither would he agree to characterize his prescription as one for the *status quo* powers, or the “haves,” because he would acknowledge the permissibility of change that is brought about by means other than force. It may be no accident (,comrades,) that Rostow’s “side” has a comparative advantage in many instruments other than force and a comparative disadvantage in conventional armaments; but a principle is not to be invalidated by its mere convenience.

#### IV.

The involvement of the United States in Vietnam tried Rostow’s theories, his strategy, and perhaps his patience. He went to work in the Johnson administration several months after the first sizable troop transports had been sent to Indochina. Along with Middle Eastern problems and with arms control, the Vietnam hostilities preoccupied most of his public activity for several years, especially after he resigned from the government.

As Rostow beheld the Vietnam situation, he regarded several of his ruling ideas as relevant and convergent: the need to stop an aggressor before worse aggression fed on early successes; the obligation of law-abiding states to come to the aid of threatened treaty-partners; the righteousness of using force in aid of law to restore peace; the duty to redress an upset

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16. See LAW, POWER, AND THE PURSUIT OF PEACE, *supra* note 1, at 10.

17. See Rostow, Book Review, *supra* note 2, at 834. In 1944, like many others, Rostow thought that the wartime alliance could survive the war, though with difficulty: “It will take energy, imagination and statesmanship of a high order to preserve the concert of the Powers. That concert can be preserved, for there are no conflicts of actual interest among the Allies which cannot be peacefully harmonized.” Rostow, Book Review, 53 YALE L.J. 796, 804 (1944).

18.

In this perspective [vindication of the United Nations Charter by the Security Council, or recommendations of the General Assembly, or individual or collective self-defense], foreign policies based on morality, idealism, and international law are not alternatives to foreign policies based on the balance of power. They complement each other, as ends and means. “World order” and “the balance of power” are not antonyms. . . . Their true antonym is a society of uncontrolled aggression—that is, the state of anarchy.

THE IDEAL IN LAW, *supra* note 3, at 270.

balance in power and position; the plenitude of presidential discretion in the conduct of foreign affairs under the Constitution.<sup>19</sup> He wrote, lectured, and argued, often (as Boris Bittker has noted) in long sessions with students, where he talked and they rapped.

It must have been rough going even for one with Rostow's justly celebrated resilience, urbanity, and courage. Many who might have been thought to be his natural allies took a very different view of the law, of the policy, and of the relationship between the two in United States actions toward Indochina. On campus in the time of troubles he was sometimes execrated by excited students. One of them told me at the time that Rostow ought to be shot; it is only fair to interpret that opinion to mean that the student favored not assassination but execution after conviction. It may be added that many students who deplored Rostow's views loved the man even though they would have shot the war criminal.

The interplay of the attacks on the universities and the attacks on United States foreign policy strained Rostow's robust democratism, overcame his robust Democratism, and moved him (on principle and interest?) to support Republican national tickets in the last few years. Toward the beginning of the Reagan Administration, Rostow, who had been active in the executive of the Committee on the Present Danger in pointing out Soviet successes and expansion compared to relative American failure and stagnation, was appointed to head the Arms Control and Disarmament Agency. ACDA has never been a stranger to interbureaucratic politics, but Rostow had been well schooled at a university. He coped with pressure from disarmers, armers, the State Department, the Defense Department, the White House, the Congress, our allies, our presumptive enemies, and whoever else claimed a say. Not for the first time, he found there was a difference between appealing to the public interest and building a political constituency.

Whether in public or in private life, Rostow has kept at it with congested vitality,<sup>20</sup> repeating and refining his repertory of themes, teaching and warning a public not always respectfully attentive. The tone has stayed much the same, but, as with many good voices and some good wine, time has darkened it: He tends to say rather more now about the tragic sense, the limits of the attainable, the imminence of disaster, and the persistence of folly.<sup>21</sup> He once asked rhetorically, "Who enjoys climb-

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19. See Rostow, Book Review, *supra* note 2.

20. "Such simple ideas [demands for instant peace through unilateral United States moves toward disarmament] scarcely do justice to the congested vitality of international life . . ." *LAW, POWER, AND THE PURSUIT OF PEACE*, *supra* note 1, at xiv-xv.

21. See, e.g., *id.* at 20 (references to "the Revolt of the Masses—recurring outbursts of hatred and barbarism seeking to destroy civilization in the name of justice"); *id.* at xviii ("Time is running out. The demons of force are slipping their chains . . ."). Contrast these vivid images with the modesty

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ing a little mountain?"<sup>22</sup> He has had to climb many little mountains, and no doubt some ascents were less enjoyable than others, but he has never lost the Alpine vision.

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of the idea pervading his recent work that the power of the United States, though great, is limited; that the United Nations Charter is a compact between States, not a table of commandments for individual mankind; that the balance of power is what we have to live in, live with, live by.

22. *THE IDEAL IN LAW*, *supra* note 3, at 170.

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